BEFORE THE
FEDERAL COMMUNCIATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	WC Docket No. 04-36
IP-Enabled Services	)	

REPLY COMMENTS OF VONAGE HOLDINGS CORP.

William B. Wilhelm, Jr.
Ronald W. Del Sesto, Jr.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Telephone: (202) 424-7500
Facsimile: (202) 424-4645

Attorneys for Vonage Holdings Corp.

Dated: July 14, 2004

Executive Summary

Vonage and a majority of the parties submitting comments in this proceeding submit that VoIP services are interstate communications and subject to the Commission's exclusive jurisdiction. VoIP services are not severable into intra- and inter-state components because physical location cannot be determined. Further, unlike wireline communications services, the Vonage customer's telephone numbers cannot serve as a proxy for geographic location.

Pursuant to the Commission's mixed use and impossibility doctrines, Vonage's service is interstate in nature. Jurisdictionally separating Vonage VoIP traffic is impossible both due to the lack of geographic data embedded in Internet protocol packets and the portability of Vonage's service. The Commission has already applied the mixed-use doctrine to certain Internet-based telephony services in order to place them solely within its jurisdiction and should do so for other VoIP services. Vonage urges the Commission to rule on the interstate nature of VoIP services as soon as possible and subsequently consider whether such services are telecommunications or information services under the Telecommunications Act.

Vonage also advocates that the Commission reject a regulatory structure based on functionality because such a test fails to address important public policy objectives. Moreover, creating a test focused on substitutability for traditional telecommunications services, interconnection with the PSTN, or the use NANP resources as factors for regulation would lead to regulatory anomalies and would frustrate Congress's intent as illustrated by the text of the Telecommunications Act.

The Commission should find that services like Vonage's are properly classified as an information service. Its service does perform a net protocol conversion, and that conversion does not fall into any of the exceptions to the net protocol conversion test.

Finally, Vonage highlights mischaracterizations and inaccuracies attribute to its service and the Company's terms of service. Vonage supports states retaining a role with respect to IP-enabled services, particularly regarding consumer protection. Vonage also clarifies that Vonage customers can still rapidly obtain alternative communications services even if Vonage ceases to be their provider because the service is completely dependent upon a third-party provided broadband Internet connection. As such, Vonage customers can use that connection to subscribe the service offering of another VoIP provider. Similarly, Vonage corrects inaccurate allegations concerning the Company's policies and capabilities alleged by a state public utilities commission. Vonage does port telephone numbers and the rates for telecommunications services that the Company pays include all applicable fees and charges, including access charges.

Table of Contents

Page No.

BEFORE THE
FEDERAL COMMUNCIATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	WC Docket No. 04-36
IP-Enabled Services	)	

COMMENTS OF VONAGE HOLDINGS CORP.

I. INTRODUCTION

Vonage Holdings Corp. ("Vonage"), by undersigned counsel, submits these reply comments in the above-referenced proceeding. Over 150 parties submitted comments in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking.[1] The importance of examining VoIP services and determining whether to subject such services to regulation cannot be underestimated. Comments were filed by software companies, equipment manufacturers, state public utility commissions, public interest advocacy groups, 911 administrators, incumbent local exchange carriers, Internet service providers, and Voice over Internet Protocol ("VoIP") application service providers. As illustrated by the number of comments filed by a wide range of companies, the Commission's conclusions as to how to regulate VoIP services will determine whether sufficient incentives will remain in the VoIP marketplace to promote continued innovation. The stakes are high as VoIP is proving to be the "killer app"[2] that spurs broadband adoption in the United States. Because the country

---

[1] *See IP-Enabled Services Notice of Proposed Rulemaking*, Docket No. 04-36, 2004 WL 439260 (rel. Mar. 10, 2004) ("*IP-Enabled NPRM*").

[2] *See, e.g.*, Donny Jackson, *VoIP Recognition*, TelephonyOnline (Jan. 26, 2004) *available at* http://telephonyonline.com/ar/telecom-voip-recognition/index.htm (visited July 12, 2004) (Chairman Powell: "VoIP is going to be a tipping point for people to buy broadband."); *Creation of Online Regulatory Distinctions in VoIP said to Concern AT&T*, Communications Daily (Feb. 12, 2004) (David Dorman, CEO, AT&T: VoIP is "a killer application for broadband . . .and will be the biggest driver of broadband adoption in the next couple of years.").

cannot risk falling any further behind the rest of world in terms of broadband "take rates,"[3] the Commission must not take action that brings to a halt broadband adoption driven by VoIP applications.

While many have predicted the rapid ascent of VoIP services and the equally accelerated decline of the circuit-switched telephone network, the Commission must remember that in the United States, there are approximately 182 million wireline access lines and 147 million wireless lines[4] compared to no more than 400,000 VoIP subscribers.[5] VoIP services are in their infancy and even if they experience explosive growth, VoIP services will not supplant traditional communications services in the near future. Indeed, Representative Fred Upton recently observed that "[w]e will never know VoIP's tremendous potential if we saddle it with unwarranted government regulation."[6] The Commission must proceed in a manner that ensures that the promise that these Internet applications hold for consumers—including improved emergency services, the delivery of innovative features and services at a fraction of the price offered by purveyors of legacy telecommunications services, and numerous other benefits—are not suppressed by a legacy regulatory regime retrofitted to the dynamic VoIP marketplace.

Vonage files these reply comments to respond to various arguments raised by a number of parties concerning VoIP services. Vonage maintains that VoIP services like those that the Company offers are interstate in nature and should not be subject to an inconsistent patchwork of

---

[3] *See Birth of Broadband*, ITU Internet Reports Table A-12 (Sept. 2003) (ranking the U.S. as 11th in the world for broadband penetration rates); *see also, Vonage Comments*, at 2-4.

[4] *See* Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30, 2003* (rel. Dec. 22, 2003), *available at* http://www.fcc.gov/wcb/iatd/comp.html (visited May 26, 2004).

[5] *See* Time to Redial: VoIP (Voice Over Internet Protocol) Makes a Comeback, Knowledge@Wharton, (Jan. 28, 2004) *available at* http://www.knowledge.upen.edu (visited May 28, 2004).

[6] *Voice Over Internet Protocol Services: Will the Technology Disrupt the Industry or Will Regulation Disrupt the Technology?: Hearings Before the Subcomm. on Telecommunications and the Internet of the House Comm. on Energy and Commerce*, 108th Congress (July 7, 2004) (written statement of Rep. Fred Upton) ("*House Hearing on VoIP*").

state regulations. To find otherwise would hobble a nascent industry and further stifle the deployment of broadband facilities in the United States. The Commission should also resist simplistic models when examining VoIP services. Engaging in a functional analysis based on arbitrary criteria would not only violate the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Telecommunications Act"), but would not serve the public interest. Under long-standing Commission precedent and the plain language of the statute, the inevitable conclusion is that VoIP services meet the definition of "information services" under the Telecommunications Act.. The Commission should reject the sophistry advanced by some parties that argue VoIP services are properly classified as telecommunications services under the Telecommunications Act. Finally, Vonage corrects the record as to the characterization of its service by certain parties.

II. VONAGE'S VOIP SERVICE IS AN INTERSTATE COMMUNICATIONS SERVICE

A number of commenting parties mistakenly argue that VoIP communications services share similar characteristics to the legacy telecommunication services of wireline providers. These parties maintain that VoIP services are severable into intrastate and interstate components. Accordingly, these parties advocate that the Commission should allow states to regulate the intrastate components of VoIP services.[7]

Vonage has submitted numerous filings arguing that it is impossible to jurisdictionally separate VoIP traffic.[8] The Company has also highlighted the broad cross-section of the industry

---

[7] *See, e.g., Cal. Pub. Utils. Comm'n Comments*, at 34-38; *Minn. Pub. Utils. Comm'n Comments*, at 11; *Missouri Pub. Serv. Comm'n Comments*, at 9; *New York Dept. of Pub. Serv. Comments*, at 9; *Pub. Utils. Comm'n of Ohio Comments*, at 18-28; *Utah Div. of Pub. Utils. Comments*, at 4; and *Virginia State Corp. Comm'n Comments*, at 9.

[8] *See, e.g., Vonage Holding Corporation's Petition for Declaratory Ruling*, Docket No. 03-211 (filed Sept. 22, 2003) ("*Vonage Petition*"), *Notice of Ex Parte Meeting in WC Docket Nos. 04-36; 03-211; 03-251; CC Docket* (cont'd)

that argue in support of a finding that VoIP services are interstate in nature.[9] It is clear from the comments submitted in this proceeding that the idea that VoIP communications can be segregated into intra- and inter-state services remains a minority position. The weight of the comments filed in this proceeding support a finding that VoIP services are interstate services subject to this Commission's exclusive jurisdiction.[10]

Nos. 02-33; 97-213; 96-45; 94-102; DA No. 04-700 (filed Mar. 22, 2004), *Notice of Ex Parte Meeting in WC Docket Nos. 03-211, 04-36* (filed Apr. 30, 2004), and *Vonage Comments*, at 14-22.

[9] *Notice of Ex Parte Meeting in WC Docket Nos. 04-36; 03-211; 03-251; CC Docket Nos. 02-33; 97-213; 96-45; 94-102; DA No. 04-700* (filed Mar. 22, 2004)

[10] *8x8, Inc. Comments*, at 10 (asserting IP-enabled services are interstate services, and the FCC should prevent inconsistent regulation by states); *Alcatel North America Comments*, at 9 (submitting the Commission should preempt state regulation to avoid Commerce Clause violations); *America's Rural Consortium Comments*, at 5 (stating the Commission must preempt state jurisdiction to ensure regulatory equity among different carriers); *AT&T Corp. Comments*, at 42 (declaring the Commission should preempt state regulation of VoIP to provide regulatory certainty); *Avaya Inc. Comments*, at 8 (maintaining the Commission should assert federal jurisdiction over many aspects of VoIP, including public policy mandates); *BellSouth Corporation Comments*, at 32 (declaring the Commission should preempt disruptive state regulation); Bend *Broadband et al. Comments*, at 13 (stating IP-Telephony should be subject to the overriding federal jurisdiction of the Commission); *Cablevision Systems Corp. Comments*, at 11 (submitting IP-enabled services are interstate in nature and subject to FCC jurisdiction); *Cisco Systems Comments*, at 2-6 (asserting the Commission should establish jurisdiction over all IP-enabled services); *Computer and Communications Industry Association Comments*, at 21 (maintaining the FCC should preempt state intervention into IP-enabled services); *CompTel/Ascent Comments*, at 3 (arguing the Commission should preempt state regulation of IP-enabled services); *Consumer Electronics Association Comments*, at 3 (claiming VoIP services are not intrastate services subject to state regulation); *CTIA Comments*, at 2 (submitting IP-enabled services are fundamentally interstate/international and should be regulated only at the federal level, if at all); *DJE Teleconsulting, Inc. Comments*, at 4 (stating the FCC should establish exclusive regulatory jurisdiction over VoIP and substitutable non-VoIP services); *Global Crossing North America, Inc. Comments*, at 7 (asserting the Commission should treat all IP-enabled services as information services subject to exclusive federal jurisdiction); *Information Technology Association of America Comments*, at 19 (maintaining the first priority should be to establish exclusive federal jurisdiction); *Information Technology Industry Council Comments*, at 3 (declaring preemption of state regulation over IP-enabled information services is warranted); *Level 3 Communications, LLC Comments*, at 13 (arguing the Commission should conclude that IP-enabled services are interstate, and subject to FCC's exclusive jurisdiction); *Microsoft Corporation Comments*, at 14 (stating the FCC should clarify the limits of state and its own federal jurisdiction and provide for exclusive federal jurisdiction; *Motorola, Inc. Comments*, at 4 (submitting immediate action should be taken to preempt inconsistent state regulation, which threatens to stifle innovation); *National Cable and Telecommunications Association Comments*, at 32 (claiming the Commission should preempt state regulation over VoIP to promote speedy and widespread deployment); *Net2Phone, Inc. Comments*, at 12 (stating IP-enabled services are interstate in nature and are subject to the FCC's exclusive jurisdiction); *NexVortex, Inc. Comments*, at 6 (maintaining the FCC should exert exclusive federal jurisdiction over IP-enabled services); *Nortel Networks Comments*, at 14 (asserting the United States needs to adopt a singular national framework for VoIP); *Nuvio Corporation Comments*, at 5 (submitting state preemption may be necessary as it is essential that the FCC create a unified national regulatory policy for VoIP); *Pac-West Telecomm, Inc. Comments*, at 8 (declaring the FCC should preempt state regulation that impedes a pro-competitive environment for IP usage); *PointOne Comments*, at 7 (claiming IP-enabled services are jurisdictionally interstate services); *Qwest Communications International, Inc. Comments*, at 25, 28 (stating federal jurisdiction is indisputable and exclusive); *SBC Communications Comments*, at 25-29 (arguing IP-enabled services, by their nature, are interstate communications, subject to exclusive FCC jurisdiction, and cannot be segregated into intrastate components); *Skype, Inc. Comments*, at 3 (declaring all Internet applications should be subject to exclusive FCC jurisdiction); *Telecommunications Industry Association Comments*, at 6 (claiming federal jurisdiction should preempt state jurisdiction to (cont'd)

The Commission's decision concerning Pulver.com's Free World Dialup ("FWD") service supports a ruling that Vonage's service is interstate in nature.[11] As in the *Pulver Order*, the portable nature of the equipment used to access Vonage's service makes it possible for customers to use a telephone number from *any* location in the United States to place and receive calls over a broadband Internet connection anywhere in the world without regard to their physical location. Like Pulver.com's service, Vonage's service is performed on the Internet which functions in a "virtual" world in which physical location is irrelevant and not possible to determine. And like Pulver.com's service, the telephone numbers used by Vonage's customers are associated with their computer IP addresses and not with an actual geographic location. These facts make it impossible for Vonage to determine where its customers are physically located when they use its service and therefore impossible to determine which communications might be interstate, intrastate, or international under traditional telephone regulation.

Vonage has recently faced arguments that because it advertises a "Unlimited Local Plan," it must be possible for the Company to jurisdictionally separate intra- and inter-state calls.[12] Vonage is operating in a marketplace where it must educate consumers on the technology it

---

avoid a divergence in approaches to VoIP services); *Time Warner, Inc. Comments*, at 26 (maintaining states should be preempted from regulating VoIP); *United States Telecom Association Comments*, at 34 (stating the VoIP market is interstate and not subject to state regulation); *Valor Telecommunications of Texas, L.P. and Iowa Telecommunications Services, Inc. Comments*, at 8 (claiming IP-enabled services are jurisdictionally interstate services); *Verizon Telephone Companies Comments*, at 31(declaring IP-enabled services are interstate in nature and subject to exclusive federal jurisdiction); *Verisign, Inc. Comments*, at 5 (submitting federal jurisdiction over VoIP and other IP-enabled services is warranted); *Virgin Mobile USA, Inc. Comments*, at 4 (stating the Commission should exempt state and local regulation of wireless IP-enabled services); *VON Coalition Comments*, at 19 (maintaining IP-enabled services should be classified as information services, subject to exclusive federal jurisdiction); *Vonage Comments*, at 14 (asserting that the Commission needs to declare IP-enabled services interstate and subject to its jurisdiction before the states create a patchwork of conflicting common carrier regulation that stifles nascent IP-enabled services).

[11] *Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, 19 FCC Rcd 3307 (2004) ("*Pulver Order*"); *see also*, *Vonage Comments*, at 16-20

[12] *Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corporation Concerning Provision of Local Exchange and InterExchange Telephone Service in New York State in Violation of the Public Service Law*, Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation, N.Y. Pub. Serv. Comm'n Case No. 03-C-1285, at 14 (issued May 21, 2004) ("*New York Order*").

utilizes. In order to do so, Vonage compares its service to that offered by legacy providers merely to highlight the cost advantages of its service. A "local" call is a contractual fiction used by Vonage for billing and marketing purposes and has nothing to do with the actual geographic location of its customers. Vonage neither knows nor needs to know the physical locations of its customers when they use the Company's service – only the customer's IP addresses are transmitted to Vonage. Instead, Vonage classifies a "call" as local or long-distance (for reasons of customer comfort) based on the area codes associated with its customers' computers, not the geographic endpoints of a communication. Thus, Vonage customers with a "401" area code assigned to their computers can be physically located in Seattle or the Isle of Mull, but place "local" (for billing purposes) calls to other "401" numbers.

III. THE COMISSION CAN PREEMPT STATE REGULATION OF SERVICES THAT ARE INSEPARABLY USED FOR BOTH INTERSTATE AND INTRASTATE COMMUNICATIONS

In response to the Commission's request for comments concerning the applicability of the impossibility or mixed use doctrines to VoIP communications, some commenting parties unconvincingly dispute the relevance of this legal precedent to VoIP services.[13] Certain parties argue that telephone numbers can serve as a proxy for geographic location allowing for the separation of VoIP communications into inter- and intra-state components.[14] While some of these parties recognize that VoIP services, in mapping telephone numbers to IP addresses, undermine the inference of a physical location on the basis of telephone numbers, these parties apparently believe that despite this logical defect, telephone numbers can still serve to

[13] *See, e.g., New York Dept, Pub. Serv. Comments*, at 9 and *Virginia State. Corp. Comm'n Comments*, at 11-14.

[14] *See, e.g. Cal. Pub. Ser. Comm'n Comments*, at 36-38; *Minn. Pub. Serv. Comm'n Comments*, at 11; Pub. *Utils. Comm'n of Ohio Comments*, at 26; and *Vermont Pub. Service Board Comments*, at 11.

jurisdictionally separate VoIP communications.[15] Others argue that the burden for preempting state regulation under the impossibility doctrine rests with the Commission and wrongly recast the mixed use doctrine as narrowly applicable only to special access services.[16]

A. Vonage's Service Is an Interstate Service Under the Impossibility Doctrine

Those parties that argue that telephone numbers can be used as a proxy for location are requesting that the Commission ignore the reality of VoIP communications in order to preserve state jurisdiction – akin to trying fit the square peg of legacy telecommunications regulatory structures into the round peg of Internet communications that defy geography. The Communications Act established "a system of dual state and federal regulation over telephone service."[17] Although states retain authority over intrastate telecommunications, "questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to *interstate* communications service are to be governed solely by federal law and [] the states are precluded from acting in this area."[18] The dividing line between the regulatory jurisdictions of the Commission and states depends on "the nature of the communications which pass through the facilities and not on the physical location of the lines."[19] As the Supreme Court held in *Louisiana*, preemption can occur "where compliance with both federal and state law is in effect physically impossible[.]"[20] The Court further found "purely intrastate facilities and services used to complete even a single interstate call may become subject to Commission regulation to the

---

15 *See, e.g., Cal. Pub. Ser. Comm'n Comments*, at 36-68; *Minn. Pub. Serv. Comm'n Comments*, at 11; and *Virginia State Corp. Comm'n Comments* at 11-13.

16 *See, e.g., New York Dept. Pub. Serv. Comments*, at 9-10.

17 *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

18 *Ivy Broadcasting Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968) (emphasis added); *see also NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) ("Interstate communications are totally entrusted to the FCC ....").

19 *Id.* (quotation and citations omitted, punctuation altered).

20 *Louisiana Pub. Serv. Comm'n.*, 476 U.S. at 368.

extent of their interstate use."[21] Accordingly, even if the Commission thought it were beneficial to create a fictional division of intra- and inter-state communications on the basis of assigned telephone numbers in order to preserve state jurisdiction over VoIP services, such a structure would depart from the text of the Telecommunications Act and counter Congress's intent. Moreover, adopting such a policy would encourage end users of VoIP services to devise complicated call forwarding and other schemes to engage in arbitrage.

It is clear from the Court's interpretation of the Telecommunications Act and the legal precedent preserved by the Telecommunications Act that the Commission cannot simply overlook inconvenient facts in order to justify state regulation. IP communications decouple telephone numbers from geographic location. A Vonage customer that lives in New York and uses a California telephone number to call England does not subject that customer to the jurisdiction of the California Public Utilities Commission simply on the basis that the Vonage customer is utilizing a telephone number associated with a California area code when the Vonage customer is not located in California. A good example of how VoIP services defy geographic classification on the basis of a telephone number is illustrated by a recent column written in the Wall Street Journal by Brian M. Carney, Deputy Editorial Page Editor.[22] Mr. Carney lives and works in Brussels, Belgium, where he is a Vonage customer, and he has a phone in his apartment that is assigned a telephone number with a 917 New York City area code. If regulation was based on the assigned telephone number, Vonage would be subject to the regulation of the New York Public Service Commission for its provision of service to Mr. Carney. Surely most people would agree that the absurdity of this result demonstrates the failing of a regulatory system based

---

21 *NARUC*, 746 F.2d at 1498.

22 Brian M. Carney, *VoIPification*, WALL STREET JOURNAL, June 14, 2004, at A17.

on assigned telephone numbers. Accordingly, it is clear that Vonage's services challenge traditional geographic assumptions made in reliance on the assigned telephone numbers.

Further, VoIP services like those provided by Vonage are portable. State public utilities commissions and this Commission must recognize that VoIP services like Vonage's challenge the traditional assumptions that underlie the existing telecommunications regulatory structure. VoIP communications services like those provided by Vonage are inherently interstate due to both the portability of such services and the fact that telephone numbers are not tied to a geographic location.

The *reduction ad absurdum* of the argument that VoIP services can be severed into intra- and inter-state services is demonstrated by the regulatory requirements that could result from such a finding. For example, one party recommends that VoIP service providers that choose to offer portable VoIP services should consider seeking certification in all fifty states and then petition the Commission for preemption of any state regulation that may be a barrier to entry.[23] Such a regulatory scheme would present an enormous barrier to entry in itself. Aside from the resources required to file and comply with regulatory requirements in over fifty jurisdictions, these companies would then have to file over fifty preemption petitions with the Commission. Companies would face the stark choice of either investing substantial resources *solely for regulatory compliance,* or ignoring consumer demand and offering a fixed-point VoIP service—stripped of functionalities that consumers desire—for purposes of complying with an ill-suited regulatory rubric that evolved in the context of a network and marketplace that bears no resemblance to that characterized by VoIP services. It is hard to imagine how the public interest

[23] *See Virginia State Corp. Comments,* at 14 (arguing that portable VoIP providers "should consider seeking certification in all states and seek from the FCC preemption (only if necessary) of any state regulation of laws that may be a barrier to entry pursuant to 47 U.S.C. § 253 of the Act.").

would be served by such a regulatory regime. Further, the Telecommunications Act bifurcation of state and federal jurisdiction clearly was meant to avoid implementing such an oppressive regulatory structure.

B. Vonage's Service is an Interstate Service Under the Mixed Use Doctrine

The mixed use doctrine is also relevant to VoIP services. When the interstate and intrastate components of communications services cannot be ascertained and segregated, the Commission has utilized the mixed-use doctrine to determine the jurisdictional treatment of this traffic. Under this doctrine, unless the interstate use of a service is *de minimis*, state regulation of a mixed-use service is preempted. [24] Some parties mistakenly argue that this doctrine is limited to special access lines.[25] The Commission referenced the mixed use doctrine in the *Pulver Order* finding:

> FWD would be considered an interstate information service in accordance with our "mixed use" doctrine. Where separating interstate traffic from intrastate traffic is impossible or impractical, the Commission has declared such traffic to be interstate in nature. Based on the record in this proceeding, it is evident that it is impossible or impractical to attempt to separate FWD into interstate and intrastate components. This "impossibility" results from the global portability feature of a FWD member's unique identification number, enabling that member to initiate and receive on-line communications from anywhere in the world where it can access the Internet via a broadband connection. Moreover, FWD's

[24] *See, e.g., Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, ¶ 107 (2000) ("[b]ecause fixed wireless antennas are used in interstate and foreign communications and their use in such communications is inseverable from their intrastate use, regulation of such antennas that is reasonably necessary to advance the purposes of the Act falls within the Commission's authority"); *Rules and Policies Regarding Calling Number Identification Service – Caller ID*, 10 FCC Rcd 11700, ¶¶ 85-86 (1995) (California default line-blocking policy was preempted because it would preclude transmission of Caller ID numbers on interstate calls, and effect of the policy was inseverable); *MTS and WATS Market Structure*, 4 FCC Rcd 5660, 5660-61, ¶¶ 6-9 & n.7 (1989) (FCC asserted jurisdiction over dedicated private lines carrying jurisdictionally mixed traffic because of the practical impossibility of measuring and billing separately for the portion of the line carrying intrastate traffic); *GTE Tel. Operating Cos. GTOC Transmittal No. 1147*, 13 FCC Rcd 22466, ¶¶ 22, 25 (1998) (FCC determined that Internet access is interstate service because, even though some of the transmissions passing over an Internet access line may be intrastate in nature, the interstate component was not *de minimis).*

[25] *See, e.g., New York Dept. Pub. Serv. Comments*, at 9-10.

> technology does not enable Pulver to determine the actual physical location of an underlying IP address.[26]

Thus, the Commission has made plain that the mixed-use doctrine applies for jurisdictional purposes to Internet based telephony and is not narrowly limited to special access lines.

Importantly, Vonage and other similarly-situated VoIP providers cannot police the "interstate" versus "intrastate" use of its service. If VoIP services are subject to state regulation, it would mean that Vonage would have to seek certification in over fifty separate jurisdictions and *simultaneously* comply with those regulations – an impossible task that no wireless or wireline carrier has to do today. Accordingly, Vonage cannot assure compliance with regulations designed to govern geographically intrastate communications. Parties advocating that VoIP providers like Vonage should be subject to a limited regulatory regime beg the larger question of why should VoIP providers be subject to legacy regulations.[27] Vonage is not comparable to any circuit switched competitive carrier and no sound reason exists to apply to Vonage the telephone regulations that apply to those carriers. Rather, as the Commission observed in the *Pulver Order*, requiring an Internet-based service provider to locate its customer "for the purpose of adhering to a regulatory analysis that served another network would be forcing changes on th[e] service for the sake of regulation itself, rather than for any particular policy purpose."[28] Any and all state telephone regulation of Vonage necessarily affects Vonage's inseverable interstate service. Under the Commission's mixed-use rule, Vonage's service is jurisdictionally interstate and not subject to PSC state telephone regulation. The inseverability doctrine mandates preemption.

---

[26] *Pulver Order* ¶ 22.

[27] *Office of the People's Counsel for the District of Columbia Comments* , at 7-9; *Nebraska Pub. Serv. Comm'n Comments*, at 5-7; *Vermont Pub. Serv. Board Comments*, at 28-37; and *Virginia State Corp. Comm'n Comments*, at 14.

[28] *Pulver Order* ¶ 21.

C. The Commission Can Determine that VoIP Services Like Vonage's Are Subject to the Commission's Exclusive Jurisdiction Without First Determining Whether Such Services Are Telecommunications or Information Services Under the Telecommunications Act

Vonage respectfully recommends that the Commission release a ruling that the service provided by the Company is an interstate service offering. As the Commission has recognized, "section 2(a) of the [Communications] Act … give[s] the Commission exclusive jurisdiction over interstate communications."[29] Section 2(a) explicitly precludes state regulation of interstate communications services. Thus "questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and … the states are precluded from acting in this area."[30] Consistent with the statutory scheme, courts have affirmed Commission decisions displacing state regulation of interstate communications on the grounds that "interstate communications … are placed explicitly within the sphere of federal jurisdiction by the plain language of the Communication Act."[31] The Commission therefore has the authority to preclude state regulation that impermissibly intrudes on the Commission's exclusive domain over interstate communications.[32]

The Commission's authority to assert exclusive federal jurisdiction over regulation of Vonage's interstate service does not depend on whether the Commission classifies Vonage's service as an "information service" regulated under the Commission's Title I ancillary

---

[29] *Id.* at n.57 (*citing* 47 U.S.C. § 152(a)).

[30] *Ivy Broadcasting Co.*, 391 F.2d at 491.

[31] *NARUC*, 746 F. 2d at 1501, n.6.

[32] As explained by the Supreme Court, federal law and policy is exclusive and can preempt state action: (1) when Congress expresses a clear intent to preempt state law; (2) when there is outright or actual conflict between federal and state law; (3) where compliance with both federal and state law is in effect physically impossible; (4) where there is implicit in federal law a barrier to state regulation; (5) where Congress has legislated comprehensively, thus occupying an entire field of regulation; or (6) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *IP-Enabled Services NPRM*, ¶ 41 (*citing*, *inter alia Louisiana Pub. Serv. Comm'n v. Commission*, 476 U.S. 355, 368-69 (1986)).

jurisdiction or a "telecommunications service," subject to regulation under Title II of the Act Rather, the Communications Act is clear that the Commission's authority to assert exclusive federal control over a particular service is unaffected by whether the Commission's regulatory power arises under Title II or is ancillary under Title I.[33]

The D.C Circuit has held that there is "no critical distinction between preemption by Title II regulation and preemption by the exercise of ancillary jurisdiction."[34] The Commission has similarly applied this principle in asserting exclusive federal jurisdiction regarding state regulation of BellSouth's voice mail service. In rejecting the arguments of state commissions that sought to regulate voice mail services, the Commission found "[w]hile BellSouth's voice mail service is an enhanced service, that fact does not limit our authority to preempt. The Court of Appeals for the District of Columbia Circuit has held specifically that there is 'no critical distinction between preemption by Title II regulation and preemption by the exercise of ancillary jurisdiction.'"[35]

Because there is no distinction between preemption using Title II and preemption using Title I ancillary jurisdiction, the Commission's preemption analysis regarding services like Vonage are not affected by the statutory classification issue. The Commission's preemption analysis will be the same regardless of the classification of the service, and thus precluding state regulation of Vonage's service does not depend on a determination that the service is an "information service" or a "telecommunications service." Moreover, as Vonage explained in its

---

[33] *See California v. FCC*, 905 F.2d 1217, 1239-43 (9th Cir. 1990); *California v. FCC*, 39 F.3d 919, 939 (1994) (rejecting claims that Commission may only preclude state regulation when it is acting under Title II).

[34] *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[35] *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, Memorandum Opinion and Order, 7 FCC Rcd 1619, 1622, ¶15, n. 44 (1992), *aff'd Georgia Public Service Commission v. FCC*, 5 F.3d 1499 *per curiam* (1993) (*citing CCIA v. FCC*, 693 F.2d at 217).

April 30, 2004, *ex parte*,[36] applying the preemption analysis to the facts of Vonage's services shows that preemption is required. Therefore, the Commission can determine now that service like Vonage's service are interstate and subject to its exclusive jurisdiction and determine later, in the *IP Enabled Services Rulemaking*, whether to apply Title I or Title II regulation to such interstate services.

IV. THE COMMISSION SHOULD REJECT ANY REGULATORY STRUCTURE BASED ON FUNCTIONALITY

Some parties argue that the Commission should adopt a functional approach when categorizing IP-enabled services.[37] These parties argue that the Commission should treat similar services alike, regardless of the underlying technology used to provide service. In determining whether a particular service constitutes a functional equivalence to traditional telecommunications services, these parties recommend that the Commission consider a variety of factors. While there are a few iterations of what these parties believe is an "appropriate" functional equivalency test, most parties recommend that the Commission consider (1) whether the particular VoIP service is marketed as, or is a substitute for, traditional telephony; (2) whether the VoIP service interconnects with the PSTN, or (3) whether the service utilizes telephone numbering resources. If a service meets any one of these three criteria, these parties advocate that the Commission subject the VoIP service to some form of traditional telecommunications regulation. The allure of simplicity permeates all three of the proponents' criteria; however, adopting any of these tests would not only violate the law but jettison from the debate important policy considerations that lie at the core of regulating communications services.

---

[36] *Notice of Ex Parte Meeting in WC Docket Nos. 03-211, 04-36* (filed Apr. 30, 2004).

[37] *See, e.g., Arizona Corp. Comm'n Comments*, at 9; *Nebraska Pub. Serv. Comm'n Comments*, at 2; *Utah Div. of Pub. Utils. Comments*, at 3; and *Vermont Pub. Service Board Comments*, at 9-11.

Jeffrey Carlisle, Senior Deputy Chief of the Wireline Competition Bureau, recently testified, "[t]he functional view ignores the fact that VoIP technology is merely an application that rides over the public Internet, or over dedicated data networks, just like any other application."[38] The VoIP revolution is not merely an interesting technological innovation, but promises to change the face of modern communications. As Mr. Carlisle aptly observed, "saying that a VoIP application is another way of making a phone call is like saying that an automobile is just another way of going someplace in your horse and buggy."[39] By focusing solely on the capability of VoIP services to provide a robust replacement to legacy telecommunications services, regulators risk smothering the potential social goods associated with VoIP. Mr. Carlisle continued:

> Yesterday, voice applications were delivered over a dedicated network that required an enormous and well-capitalized service provider in order to maintain basic infrastructure. And the provider demanded a protected monopoly in return for doing so. Tomorrow, the voice application – in fact, all applications – will be separated from the physical transmission network. The implications for how voice services are marketed and purchased are staggering. No longer is innovation the sole province of the monopoly provider, who may face little pressure to innovate. Rather, innovation in telecommunications can come from any entrepreneur, small company or enterprise that can connect to the network. [40]

In the face of revolutionary technological developments and a rapidly changing marketplace that promises to deliver numerous innovative service offerings at more affordable prices to consumers, employing a test based on functionality without considering important public policy

---

[38] *House Hearing on VoIP*, supra n. 6 (written statement of Jeffrey Carlisle, Senior Deputy Chief of the Wireline Competition Bureau, Federal Communications Commission).

[39] *Id.*

[40] *Id.*

objectives would imperil the enormous benefits that consumers currently enjoy today and would deny them of the future benefits of the technology as well.[41]

A. Substitutability Should be Rejecting as a Test for Title II Regulation

The Commission should reject any analysis that would focus on whether a particular service can, or is marketed as, a substitute for traditional telecommunications services. Adopting this methodology strips away important policy considerations. Rather than examining how the public interest is furthered by regulating a particular service, the Commission is left with the mechanical task of determining whether a new technology can be, or is advertised as, a substitute for legacy telecommunications services. The test ignores the fact that companies like Vonage that employ state-of-the-art technologies must educate and market to their potential customer base by comparing their services to what customers are currently utilizing. Further, while VoIP services like Vonage can serve as a substitute for local service, there are also important enhancements and differences between its service and traditional telecommunications services. Specifically, Vonage's service empowers customers to manage their account through a website interface, offers real-time billing updates, and includes numerous features either unavailable to users of legacy telecommunications services—such as receiving voicemails as an e-mail attachment—or more expensive when provided by incumbent telecommunications companies.

Additionally, while the test appears simple and easy to administer, in reality, it merely removes important public policy considerations from the examination of service offerings. The debate would shift from what social goods need to be realized through regulation, to a mundane examination of what features and capabilities mandate that a particular VoIP service qualifies as

[41] *See, e.g.*, Ken Belson and Matt Richtel, *Ventures Aim to Cut Cost of Overseas Cell Calls to Pennies*, NEW YORK TIMES, May 17, 2004, at C6 (reporting on an Internet based service that drastically reduces the price of international calls made on cellular telephones).

a substitute for POTS. For example, is it enough that a service allows for a real-time transmission of a two-way conversation, or does it have to be also of a certain quality? Must it provide equivalent access to emergency services? How many features must it share in common with POTS to truly serve as a replacement service? Vonage submits that if the Commission were to adopt the substitutability test, it would achieve little in terms of expediency and lose a lot as measured against serving the public interest.

B. Interconnection with the PSTN Should be Rejected as a Test for Title II Regulation

Interconnection with the PSTN is an overly broad test that would reach far more services than VoIP and irrationally expand regulation. Dial-up users of Internet access services interconnect with the PSTN in order to reach AOL, MSN or other Internet access providers. If interconnecting with the PSTN is the salient factor in determining whether to regulate a particular service, then providers of dial-up Internet access would fall subject to regulation. Further, such a test leads to regulatory anomalies. The regulatory status of Internet access service would depend on whether the customer reaches the service *via* dial-up or broadband connectivity. Companies would be subject to regulation for certain customers, *i.e.*, dial-up users of Internet access services, but not for customers that access their services through broadband Internet connections, such as DSL or cable modem.

Aside from the obvious example of Internet access providers, regulation based on interconnection with the PSTN would expand common carrier regulation to non-telecommunications-related private businesses as well. Medium to large companies that maintain their own PBX systems to run their businesses also interconnect with the PSTN. Adopting PSTN interconnection as a criteria for regulating a particular entity would radically alter the current regulatory structure, changing the focus from the nature of the service offered –

"telecommunications" versus "information" – to a blunt but bright line test of whether there is interconnection with the PSTN. Such a test does not consider the policy reasons for regulating certain services and should be rejected the Commission.

C. Use of NANP Resources Should be Rejected as a Test for Title II Regulation

As with the substitutability and interconnection with the PSTN tests, the use of North American Numbering Plan Numbers ("NANP") as a touchstone for subjecting communication service providers to regulation fails as it creates an arbitrary standard at the expense of public policy considerations. Certain common carriers services provided by traditional telecommunications carriers do not use NANP numbers but are subject to Commission regulation. For example, DSL and frame relay services do not utilize telephone numbers but are regulated. Further, this test, like the other two, fails to factor into the regulatory calculus of social policy objectives. The Commission should evaluate whether the market for a particular service is competitive or whether there is some kind of market distortion that warrants regulation.

D. Adopting Any of the Three Tests Would Violate the Telecommunications Act

Many regulators have fallen victim to the Siren song of simplicity only to shipwreck on the rocks of the Telecommunications Act. All three criteria advocated by the parties that ask the Commission to ignore the special characteristics of VoIP services like Vonage's are effectively requesting that the Commission ignore the law. The Telecommunications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public regardless of the facilities used."[42] The term "telecommunications" is defined as "transmission, between or

[42] 47 U.S.C. § 153(46).

among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[43] An "information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[44] None of the tests advocated by the proponents has a basis in the Telecommunications Act. Substitutability for a legacy telecommunications service, interconnection with the PSTN and the use of NANP resources are absent from the definitions of "telecommunications," "telecommunications service," and "information service." Accordingly, to fashion a test on any of these factors would exceed the Commission's delegated authority in violation of the Telecommunications Act.

V. VONAGE PROVIDES AN INFORMATION SERVICE UNDER THE TELECOMMUNICATIONS ACT

Some parties incorrectly argue that VoIP services are properly classified as "telecommunications services" under the Telecommunications Act. Certain parties mistakenly suggest that VoIP services like Vonage do not perform a "net protocol conversion" when measured from the user's standpoint.[45] Others wrongly assert that whatever protocol conversion does take place falls within the Commission's exceptions to the net protocol conversion test. Specifically, these parties inaccurately characterize the protocol conversion performed by Vonage's service as between the subscriber and the network for call set-up or call routing; or

---

[43] 47 U.S.C. § 153(43).

[44] 47 U.S.C. § 153(20).

[45] *See, e.g., Cal. Pub. Utils. Comm'n Comments*, at 18-19; *Communications Workers of America Comments*, at 10; *NARUC Comments*, at 8-9; *Missouri Pub. Serv. Comm'n* Comments, 7-8; *New Jersey Ratepayer Advocate Comments*, at 13-14; and *Pub. Utils. Comms'n of Ohio Comments*, at 14-17.

incorrectly maintain that Vonage's protocol conversion is performed merely to facilitate the provision of an overall telecommunications or basic service and therefore does not qualify as an information service under the Telecommunications Act; or misconstrue Vonage's service as including the use of information service for the management, control or operation of a telecommunications network or the management of a telecommunications service.[46]

Vonage's service does perform a net protocol conversion and its net protocol conversion does not fit any of the exception to the Commission's net protocol conversion test. Vonage has responded to such arguments in the context of the ongoing litigation between the Company and the Minnesota Public Utilities Commission. Attached to these comments is copy of Vonage's brief filed with the United States Court of Appeals for the Eighth Circuit.[47] Vonage refers the Commission to this brief for the arguments that detail why Vonage's service satisfies the net protocol conversion test and does not fall into any of the exceptions to this test.[48]

VI. FRONTIER MISCHARACTERIZES VONAGE'S TERMS OF SERVICE

In comments filed by Frontier and Citizens Telephone Companies ("Frontier"), Frontier misrepresents Vonage's terms of service and distorts the need for regulating VoIP services.[49] As the Commission is aware, Frontier filed a complaint against Vonage in the State of New York.[50] Frontier's comments are merely an extension of Frontier's efforts to prevent its captive base of ratepayers from switching to the superior, innovative services offered by Vonage at a lower price. Unable to compete in the marketplace, Frontier has resorted to casting unsupportable

---

[46] *See, e.g., Cal. Pub. Utils. Comm'n Comments,* at 22-24; *Minn. Pub. Ser. Comm'n Comments*, at 6; *NARUC Comments,* at 8-9; and *City and County of San Francisco Comments,* at 6-7.

[47] *Vonage Holdings v. Minn. Public Utils Comms'n, et. al.*, Case No. 04-1434, Brief of Vonage Holdings (filed May 18, 2004) ("*Vonage Brief*"), included as Attachment A to these reply comments.

[48] *See Vonage Brief,* at 30-33.

[49] *See Frontier Comments*.

[50] *Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corporation Concerning Provision of Local Exchange and InterExchange Telephone Service in New York State in Violation of the Public Service Law*, N.Y. Pub. Serv. Comm'n Case No. 03-C-1285 (issued October 9, 2003).

aspersions on Vonage's service, while also refusing to process port requests from its customers that would like to switch to Vonage's service, in violation of federal and state law.

Frontier incorrectly asserts that regulation is required in order to protect VoIP consumers. As detailed in Vonage's initial comments, the Company supports states retaining an important role with respect to IP-enabled services.[51] Specifically, Vonage emphasized that state laws concerning consumer protection, including truth-in advertising and predatory business practices, are all enforced by state jurisdictions outside of traditional common carrier regulation.[52] States have the ability to determine what state agency is responsible for enforcing these laws. Thus concerns relating to consumer protection are wholly unrelated to subjecting VoIP services to traditional common carrier regulations promulgated to restrain the anti-competitive and anti-consumer practices of firms that possess market power like Frontier.

Furthermore, states will retain jurisdiction to address traditional consumer protection issues as they apply to information services. For example, state attorneys general will retain authority to address consumer complaints and fraud. Under a federal framework, states will only lose the ability to impose common-carrier regulations on providers of IP-enabled services. Consumer protection statutes and agencies that work to resolve consumer complaints will retain their existing authority they have today over any business operating or offering services in their states.[53]

Frontier alleges that Vonage's terms of service allow the Company "not only to terminate service for any reason at any time, but further to charge a substantial fee for disconnection."[54]

---

[51] *See Vonage Comments*, at 22-23; *Notice of Ex Parte Meeting in WC Docket Nos. 03-211, 04-36* (filed Apr. 30, 2004); and *Notice of Ex Parte Meeting in WC Docket Nos. 04-36; 03-211; 03-251; CC Docket Nos. 02-33; 97-213; 96-45; 94-102; DA No. 04-700* (filed Mar. 22, 2004).

[52] *See Vonage Comments*, at 22-23.

[53] *Id.*

[54] *See Frontier Comments*, at 4.

Vonage's terms of service clearly provide that under certain circumstances, no disconnection fee applies.[55] Further, Vonage will purchase back the Multimedia Terminal Adapter from customers for $39.99 upon receipt of the device, the amount charged for disconnection.[56]

Frontier implies that Vonage's provision for arbitration is an ineffective means to protect consumers.[57] Vonage strives to resolve all customer disputes informally if possible. Failing that, Vonage's Terms of Service provide for mandatory arbitration of disputes. This provision is consistent with common practice in both regulated and non-regulated industries, and arbitration has long been recognized in many states, including in New York where Frontier filed its complaint against Vonage, as a reasonable and desirable dispute resolution mechanism.[58] Arbitration and other alternative dispute resolution mechanisms are also favored under the Federal Arbitration Act,[59] as well as the Commission's policies.[60]

Frontier also states that a single line customer who ports their wireline service to Vonage is entirely "at the mercy of Vonage's terms of service if he or she wishes to keep any dial tone service at all."[61] Frontier fails to grasp the most basic element of Vonage's service. Vonage's service is completely dependent upon a *third-party provided* broadband Internet connection. If Vonage disconnects a customer's service for any reason, that customer still has broadband connectivity to the Internet. That customer can obtain dial tone service without Vonage's

---

[55] *See* Vonage Terms of Service, § 4.4, *available at* http://www.vonage.com/features_terms_service.php (last visited July 12, 2004*).*

[56] *See* Vonage Terms of Service, § 4.6, *available at* http://www.vonage.com/features_terms_service.php (last visited July 12, 2004*).*

[57] *See Frontier Comments*, at 4.

[58] *See, e.g., Nationwide Gen. Ins. Co. v. Investors Ins. Co. of America*, 332 N.E.2d 333, 335 (N.Y. 1975) ("[T]he announced policy of this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties."); *Ferguson Elec. Co. Inc. v. Kendal At Ithaca, Inc.*, 711 N.Y.S.2d 246, 249 (N.Y. App. Div. 2000) ("[T]he public policy of this State favors and encourages arbitration and ADR resolutions").

[59] *See* 9 U.S.C.A. § 1, *et seq.*

[60] *See* 47 C.F.R. § 1.18; see also, *Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, 6 FCC Rcd 5669, 5670 (1991).

[61] *See Frontier Comments*, at 4.

cooperation from numerous other providers of VoIP services or from traditional telephony service providers.

Perhaps the greatest weakness of Frontier's allegations is that Frontier never shows why a service provided in a highly competitive marketplace should be subject to heightened consumer protection rules in the first place. Where customers are reliant on a company that possesses market power to deliver services, it makes perfect sense to regulate that firm. However, where market forces are free to operate, competition provides sufficient discipline to ensure that customers' needs are protected.

A good example of the impact of competition on Vonage's service offering is illustrated by other terms of service that Frontier failed to include in their comments. For example, Vonage offers a 14-day money back guarantee to its business customers and a 30 or 90 day money back guarantee to its residential users. Within the applicable timeframe, customers dissatisfied with Vonage's service can have their money refunded.

In response to customer demands, Vonage also offers 24/7 customer support. Its web-based interface allows customers to view their billing information in real-time. For $14.99, customers receive unlimited "local" calling and 500 minutes of "long distance" calls anywhere in the United States and Canada. Standard features included with Vonage's service are provided by Frontier as extras requiring customers to spend even more money. Clearly, competition is delivering to consumers many important benefits that cannot be ignored.

VII. THE MINNESOTA PUBLIC UTILITIES COMMISSION ALLEGATIONS CONCERNING VONAGE'S SERVICE ARE INACCURATE

As the Commission is aware, Vonage is involved in litigation in the United States Court of Appeals for the Eighth Circuit with the Minnesota Public Utilities Commission ("MPUC").[62] Further, the Company has pending a Petition for Declaratory Ruling seeking preemption of a MPUC order that has been permanently enjoined by the Federal District Court for the District of Minnesota.[63] The MPUC's comments contain a number of factual inaccuracies concerning Vonage's service. For example, the MPUC alleges, without providing any support, that Vonage avoids paying access charges otherwise assessed on carriers interconnecting with the PSTN thus shifting a greater cost of the network to PSTN customers.[64] Vonage is an end user of telecommunications services meaning that just like any other end user, the Company does not directly pay access charges. However, Vonage does not "avoid paying access charges" as the rates that the Company pays for telecommunications services includes access charges.[65]

The MPUC also makes the baseless allegation that Vonage will not port numbers in most cases, severely limiting its customers' ability to switch providers.[66] While Vonage would prefer to hold on to all customers, the Company does not and has not refused to port telephone numbers. The number portability difficulties that Vonage and its customers experience have to do with the difficulties encountered by the Company when the porting out carrier either subjects Vonage and requesting end user to extremely long delays in processing the porting request or refusing to process the porting request in violation of federal law.

---

62 *See Vonage Holdings v. MN Public Utilities, et. al.*, Case No. 04-1434.

63 *See Vonage Petition; see also, Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, 290 F.Supp.2d 993, (D. Minn. 2003).

64 *See Minn. Pub. Util. Comm'n Comments*, at 3-4.

65 *See* Declaration of John Rego, *Vonage Holdings Corp. v. The New York State Public Service Commission*, Civil No. 04-04306, ¶ 36 (filed June 7, 2004), included as Attachment B to these reply comments.

66 *See Minn. Pub. Utils. Comm'n Comments*, at 3-4.

The MPUC also states that Vonage does not contribute to the Universal Service Fund ("USF"), raises concerns relating to access to emergency services and the needs of the disabled. As explained in detail in the Company's initial comments, VoIP providers like Vonage indirectly contribute to the USF just like any other end user of telecommunications services.[67] Vonage supports a direct contribution methodology for VoIP providers as detailed in its initial comments.[68] Concerning access to emergency services, Vonage recognizes the importance and the need for providing such services and is actively involved in creating a solution for the VoIP industry.[69] As explained in the Company's initial comments, access to emergency services is an industry-wide problem.[70] What the MPUC failed to mention is that Vonage takes access to emergency services so seriously that the Company is currently involved in 911 trials in five states, including the State of Minnesota. In terms of providing access to people with disabilities, Vonage is excited about the potential for VoIP and other broadband application services to greatly improve the delivery of communications services to the disabled community. Vonage is working to incorporate new features into its service that will greatly assist those with disabilities. For example, the Company is working on a video phone that would improve communications for many people with differing disabilities. In a world where video phone calling and speech-to-text applications are commonplace, the access to communications services for people with disabilities will rapidly improve. At its core, VoIP pushes intelligence from the bowels of the network to the edge allowing for end user customization of feature sets and empowering all users, including those with disabilities, to customize feature sets to their unique needs.

---

67 *See Vonage Comments*, at 47-52.
68 *Id.*
69 *Id.* at 37-45.
70 *Id.*

VIII. CONCLUSION

Vonage urges the Commission to tread lightly when considering whether and how to regulate IP-enabled services. The potential consumer benefits are immeasurable and the technology promises to revolutionize the delivery of communications services. As such, the risks of inappropriate regulation are enormous, while the public benefits are ambiguous, particularly in light of the competitive marketplace for VoIP services.

The Commission should expeditiously rule that VoIP services like Vonage's are interstate in nature. Not only is the Internet a global network, but Internet protocol does not embed any geographical information that allows service providers to determine their customers' location. Further, the Commission's mixed use and impossibility doctrines also support a finding that VoIP services are interstate services.

Vonage respectfully recommends that the Commission reject a functional analysis of VoIP services. Such a simplistic model will not be easy to administer and will only result in shifting the dialogue from public policy concerns to a factual analysis of feature sets, quality of service and other service characteristics. Further, such an approach would violate the Telecommunications Act.

The Commission should also reject any arguments that attempt to misclassify VoIP services under the Telecommunications Act as telecommunications services. VoIP services like Vonage's perform a net protocol conversion and do fit within any of the Commission's exceptions to that test. Accordingly, the Commission should find that VoIP services are information services.

Finally, the Commission must reject Frontier's and the MPUC's inaccurate dispersions of Vonage's service. Vonage strives to provide excellent customer service and is subject to intense competitive pressures. Vonage subscribers can easily choose a new provider for any reason,

including if they are dissatisfied with the Company's terms of service. Contrary to the baseless allegations of the MPUC, Vonage does not avoid access charges, indirectly contributes to USF, is a big proponent and of making wireline-like 911/E911 services available to users of VoIP services, and believes that VoIP offers people with disabilities an enormous amount of opportunities.

Respectfully submitted,

/s/
William B. Wilhelm, Jr.
Ronald W. Del Sesto, Jr.

Attorneys for Vonage Holdings Corp.

Dated: July 14, 2004

9156323v2